APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

v.

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

No. 91 C 5525

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTONS TO DISMISS

TO THE HONORABLE CHARLES R. NORGLE, SR., one of the Judges of the United States District Court for the Northern District of Illinois.

In its Report and Recommendation issued on September 26, 1991, this court concluded that plaintiffs had shown a likelihood of success on the merits of their claim that the forum selection and choice of law clauses in their contractual undertakings with defendants should not be enforced. This court read the relevant decisions of the Supreme Court and the anti-waiver provision of the 1933 Securities Act to mean that if the combined effect of the parties' forum selection and choice of law clauses was to make it likely that plaintiffs would lose not only a judicial forum but their securities law cause of action, the clauses should not be enforced.

In rejecting this court's recommendation in his February 24, 1992 Order ("the Order"), Judge Norgle clearly rejected this court's interpretation of the governing law. Judge Norgle ruled that once it is determined that an agreement is "international," the anti-waiver provision of the 1933 Securities Act will not overcome the parties' freely-negotiated forum selection and choice of law clauses.

While Judge Norgle's decision establishes only that plaintiffs have not shown a *likelihood* of success on the merits and does not *necessarily* mean that their claims must be dismissed, this court views Judge Norgle's decision as dispositive for all practical purposes. The contracts at issue are clearly "international" in the sense described by Judge Norgle. This court believes that based upon that finding, Judge Norgle would uphold the forum selection clauses on this record.

This court might well reach this same conclusion applying its own interpretation of the relevant Supreme Court precedents. On a fuller examination of English law, it might conclude that an English forum would adequately allow plaintiffs the opportunity to vindicate their rights. It might conclude that plaintiffs' securities claims are barred by limitations, that the claims must be arbitrated or that the allegations of fraud are insufficient to disturb the integrity of plaintiffs' letters of credit. But pursuing any of these issues would be expensive and time-consuming for the parties. Since this court views Judge Norgle's analysis of the issues as dispositive of a controlling question of law raised by the motions to dismiss, it sees no good reason to delay the proceedings further. Based on Judge Norgle's order of February 24, 1992, therefore, it is recommended that the forum selections clauses of the parties' agreements be upheld, and that accordingly, the Motions to Dismiss the Amended Complaint of Defendant The Society of Lloyd's and Defendants Lime Street Underwriting Agencies Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick M. Corbett and Bankside Underwriting Agencies Ltd., be granted.

Counsel are given ten days from the date hereof to file objections to this Report and Recommendation with the Honorable Charles R. Norgle, Sr. Failure to object constitutes waiver of the right to appeal.

Respectfully submitted,

JOAN B. GOTTSCHALL

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: April 20, 1992